No. 97-889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.; STEVENS SHIPPING & TERMINAL COMPANY; STEVEDORING SERVICES OF AMERICA; RYAN-WALSH INC.; STRACHAN SHIPPING COMPANY; CERES MARINE TERMINALS, INC.; and SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER CEASAR WRIGHT

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. THE LABOR MANAGEMENT RELATIONS ACT, RATHER THAN THE FEDERAL ARBITRATION ACT, GOVERNS THIS CASE 3
II. *ALEXANDER v. GARDNER-DENVER CO.* WAS CORRECTLY DECIDED AND SHOULD BE REAFFIRMED 7
III. THE LARGER CONTEXT OF THIS CASE DEMONSTRATES THE NEED FOR FURTHER GUIDANCE ON THE ARBITRATION OF CIVIL RIGHTS CLAIMS 9
A. Agreements to Arbitrate Should Be Knowing and Voluntary 12
B. Arbitration Agreements Should Not Impose Potentially Onerous Costs on The Claimant 16
C. Arbitration Procedures Must Provide Remedies And Safeguards Coextensive With Those Available in a Judicial Forum 17
D. Arbitration Must Provide Fair and Accountable Procedures 20
E. Arbitration Awards Must Be Subject to Meaningful Judicial Review 22
CONCLUSION 25

TABLE OF AUTHORITIES

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Aetna Insurance Co. v. Kennedy,
301 U.S. 389 (1937) 14
Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 17
Alcaraz v. Avnet, Inc.,
933 F. Supp. 1025 (D.N.M. 1996) 18
Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 2,6,8,9,11,15,22
American Postal Workers Union v. United States Postal Service, 861 F.2d 211 (9th Cir. 1988) 4
Asplundh Tree Experts Co. v. Bates,
71 F.3d 592 (6th Cir. 1995) 5
Austin v. OwensBrockway Glass Container, Inc.,
78 F.3d 875 (4th Cir.), *cert. denied*,
117 S. Ct. 432 (1996) 5,7,9
Barrentine v. Arkansas-Best Freight System, Inc.,
450 U.S. 728 (1981) 6,8,19,23
Battle v. Prudential Insurance Co.,
973 F. Supp. 861 (D. Minn. 1997) 13
Beauchamp v. Great West Life Assurance Co.,
918 F. Supp. 1091 (E.D. Mich. 1996) 13
Bernhardt v. Polygraphic Co. of America,
350 U.S. 198 (1956) 23
Bishop v. Smith Barney, Inc.,
No. 97 CIV. 4807(RWS), 1998 WL 50210
(S.D.N.Y. Feb. 6, 1998) 13
Brisentine v. Stone & Webster Engineering Corp.,
117 F.3d 519 (11th Cir. 1997) 7
Burnett v. Grattan,
468 U.S. 42 (1984) 19
Chisolm v. Kidder, Peabody Asset Mgt., Inc.,
966 F. Supp. 218 (S.D.N.Y. 1997) 24
Cole v. Burns International Security Services,
105 F.3d 1465 (D.C. Cir. 1997) 5,16,17,24,25

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105 F.3d 659 (6th Cir.), *cert. denied*,
118 S. Ct. 169 (1997) 12
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121 F.3d 818 (2d Cir. 1997), *cert. denied*,
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449 U.S. 590 (1981) 22
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957 F.2d 424 (7th Cir.), *cert. denied*,
506 U.S. 906 (1992) 19
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560 F.2d 224 (7th Cir. 1977), *cert. denied*,
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102 F.3d 1464 (8th Cir. 1996) 20
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514 U.S. 938 (1995) 24
Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 8,20
Gibson v. Neighborhood Health Clinics, Inc.,
121 F.3d 1126 (7th Cir. 1997) 13
Gilmer v. Interstate / Johnson Lane Corp.,
500 U.S. 20 (1991) 1,3,4,9,15,17,20,22,23
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482 U.S. 656 (1987) 8

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110 F.3d 222 (3d Cir.), *cert. denied*,
118 S. Ct. 299 (1997) 12,13,18
Harrison v. Eddy Potash, Inc.,
112 F.3d 1437 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) .. 4,7
Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901,
763 F.2d 34 (1st Cir 1985) 20
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940 F. Supp. 1447 (D. Minn. 1996) 18
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757 F.2d 752 (9th Cir. 1985) 14
Kiernan v. Piper Jaffray Cos., Inc.,
137 F.3d 588 (8th Cir. 1998); 24
Kinnebrew v. Gulf Insurance Co.,
67 FEP Cases (BNA) 189 (N.D. Tex. 1994) 18
Leonard v. Clear Channel Communications I,
No. 972320-D/A, 1997 WL 581439
(W.D. Tenn. July 23, 1997) 13
Livadas v. Bradshaw,
512 U.S. 107 (1994) 8,15
Maryland Casualty Co. v. Realty Advisory Board,
107 F.3d 979 (2d Cir. 1997) 5
Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6
Maye v. Smith Barney, Inc.,
897 F. Supp. 100 (S.D.N.Y. 1995) 13
McDonald v. City of West Branch,
466 U.S. 284 (1984) 9,23
McIlroy v. Painewebber Inc.,
989 F.2d 817 (5th Cir. 1993) 24
Metropolitan Edison Co. v. NLRB,
460 U.S. 693 (1983) 6

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128 F.3d 1456 (11th Cir. 1997) 24
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No. 96–20383, 1997 WL 542708 (N.D. Cal. Aug 21, 1997) 13
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119 F.3d 756 (9th Cir. 1997), *cert. denied*,
66 U.S.L.W. 3474 (U.S. Apr. 20, 1988) ... 4,12,14
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25 F.3d 1437 (9th Cir.), *cert. denied*,
513 U.S. 1044 (1994) 13
O'Neil v. Hilton Head Hospital,
115 F.3d 272 (4th Cir. 1997) 6
Occidental Chemical Corp. v. International Chemical Workers Union,
853 F.2d 1310 (6th Cir. 1988) 5
Paladino v. Avnet Computer Technologies, Inc.,
134 F.3d 1054 (11th Cir. 1998) 5,17
Patterson v. Tenet Healthcare, Inc.,
113 F.3d 832 (8th Cir. 1997) 5,13
Penny v. United Parcel Service,
128 F.3d 408 (6th Cir. 1997) 7
Posadas de Puerto Rico v. Association de Empleados,
873 F.2d 479 (1st Cir. 1989) 5
Prudential Insurance Company of America v. Lai,
42 F.3d 1299 (9th Cir. 1994), *cert. denied*,
516 U.S. 812 (1995) 13
Pryner v. Tractor Supply Co.,
109 F.3d 354 (7th Cir.), *cert. denied*,
118 S. Ct. 295 (1997) 5,7,8,14,15,18
Rojas v. TK Communications Inc.,
87 F.3d 745 (5th Cir. 1996) 5
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 76 FEP Cases (BNA) 681
(D. Mass. 1998) 10,15,21,22
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482 U.S. 220 (1987) 12,23
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118 S. Ct. 275 (1997) 7
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(5th Cir. 1984) 20
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353 U.S. 448 (1957) 4
Tran v. Tran,
54 F.3d 115 (2d Cir. 1995) 7
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215 F.2d 221 (4th Cir. 1954) 6
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484 U.S. 29 (1987) 4
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Vaca v. Sipes,
386 U.S. 171 (1967) 8
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117 S. Ct. 946 (1997) 7

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(No. 97–15698) 3,16

3. Statutes and Legislative Materials

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Americans With Disabilities Act, 42 U.S.C. § 12116 .. 2,12
Americans With Disabilities Act, 42 U.S.C. § 12117(a) 2,19
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Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) 19
Civil Rights Act of 1964, 42 U.S.C. § 2000e-12 2,12
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Labor Management Relations Act, 29 U.S.C. § 185 2,3
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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last thirty-three years, the Lawyers' Committee and local Committees in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 150 *amicus curiae* briefs before this Court and the Federal appellate and district courts.

This case presents the issue of whether a collective bargaining agreement may serve as a compulsory pre-dispute arbitration agreement—and thus preclude a civil action—within the scope of this Court's decision in *Gilmer v. Interstate /*

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[1] The position that the Lawyers' Committee and AARP take in the following brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

Johnson Lane Corp., 500 U.S. 20 (1991). Because the Lawyers' Committee and AARP represent many unionized employees, the outcome of this case is critical to its efforts to enforce the civil rights of those clients. The Court's decision may also have collateral effects for arbitration of employment disputes in all settings, an issue in which the Lawyers' Committee and AARP—owing to their civil rights caseload—have an especially keen interest.

SUMMARY OF ARGUMENT

There is no federal statutory basis for enforcement of the arbitration provisions of the instant collective bargaining agreement. The Federal Arbitration Act (FAA) does not extend to contracts of employment, as is the case here, of workers in the transportation industry. Similarly, the Labor Management Relations Act (LMRA) does not permit the general arbitration provisions at issue to bar judicial enforcement of Petitioner's statutory civil rights claim. Under the LMRA, not only must a waiver of statutory rights under a labor contract be clear and unmistakable—a requirement that was not satisfied here—but a union may not bargain away the statutory rights of employees beyond the labor-management arena.

Enforcement of the collective bargaining agreement's arbitration provisions to cover Petitioner's statutory civil rights claim would also squarely conflict with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The interests of the union, which represents the collective, and those of the individual, whose rights are the subject of the civil rights acts, can differ significantly. *Alexander* therefore held that the prior grievance and arbitration of claims under a collective bargaining agreement does not preclude a civil action under Title VII. Because the tension between majoritarian and individual interests remains as salient today as in the past, *Alexander* should be reaffirmed, and Petitioner's ability to secure a judicial forum for resolution of his federal statutory claim should be preserved.

More broadly, the types of arbitration provisions that are intended to cover statutory claims vary widely in quality and fairness. Many employers simply impose procedures of their own devising on their applicants and employees, without any negotiation. As a result, some employees who are victims of civil rights violations are unable to pursue and obtain effective relief through the arbitration process. Before enforcing arbitration provisions for the adjudication of civil rights claims, courts should ensure that, at a minimum, five factors are met: (1) the waiver of a judicial forum is knowing and voluntary; (2) the employee's exercise of the arbitration right does not require undue cost or burden; (3) arbitration remedies are coextensive with those provided by the statute at issue; (4) the arbitration process is fair; and (5) arbitration awards are subject to meaningful judicial review.

ARGUMENT

I. THE LABOR MANAGEMENT RELATIONS ACT, RATHER THAN THE FEDERAL ARBITRATION ACT, GOVERNS THIS CASE

The lower court did not directly address the federal statutory basis for enforcement of the arbitration provisions of the collective bargaining agreement. There are two possibilities: (1) the FAA, 9 U.S.C. § 1 *et seq.*; or (2) section 301 of the LMRA, 29 U.S.C. § 185. The FAA codifies enforcement of arbitration clauses in federal law, and provided the statutory framework for *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that a pre-dispute arbitration agreement imposed by the New York Stock Exchange as a condition of registration as a broker-dealer extended to the employee's claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). But as *Gilmer* recognized, § 1 of the FAA excludes arbitration of "contracts of employment of seamen, railroad employees, or any other class

of workers engaged in foreign or interstate commerce."[2] 500 U.S. at 25 n.2.

Although labor contracts would appear to be excluded from the scope of the FAA, the Court has yet to interpret the § 1 exclusion[3] and the courts of appeals have been divided for decades over its scope. Some courts hold that the clause excludes all labor contracts from coverage,[4] others hold that the exclusion is limited to contracts of employment in the transportation industry,[5] and a third group adopts different interpretations depending on whether the contract is collectively bargained or individual.[6] The Fourth Circuit falls into the last of these camps, holding that the FAA does not apply to collective bargaining agreements.[7] Yet even by the narrowest interpreta-

[2] *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berk. J. of Employ. & Lab. L. 131 (1996) (history of the FAA § 1 exclusion).

[3] In *Gilmer*, the Court reserved the issue whether FAA § 1 excludes employment contracts, 500 U.S. at 25 n.2, while the dissent would have found that the FAA categorically excludes them, *id.* at 36–43. In *United Paperworkers Int'l Union v. Misco*, Inc., 484 U.S. 29, 40 n.9 (1987), the Supreme Court stated, without particular discussion of the issue, that the FAA did not apply to a labor contract at a paper converting plant. *See also Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (applying § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to collective bargaining agreement without mentioning FAA), *and id.* at 466 (Frankfurter, J. dissenting) (concluding that FAA did not apply to labor contract).

[4] The Ninth and Tenth Circuits hold that FAA § 1 excludes all collective bargaining agreements. *See, e.g., American Postal Workers Union v. United States Postal Service*, 861 F.2d 211, 215 n.2 (9th Cir. 1988); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997), *cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97–232). *But see Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759–60 n.4 (9th Cir. 1997) (scope of FAA exemption for individual employment agreements "remains an open question in this Circuit"), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1988) (No. 97–1137).

[5] The Second, Third, Seventh, Eighth, and D.C. Circuits have all adopted this position. *Maryland Casualty Co. v. Realty Advisory Board*, 107 F.3d 979, 982 (2d Cir. 1997); *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450, 452 (3d Cir. 1953) (*en banc*); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356–60 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835–36 (8th Cir. 1997). The Eleventh Circuit recently assumed in one opinion that the FAA applied to an employment contract, but did not decide the issue because the record was not fully developed. *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1056 n.1 (11th Cir. 1998).

[6] The First, Fifth and Sixth Circuits report conflicting decisions. *Compare Posadas de Puerto Rico v. Association de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Int'l Union of Electrical, Radio & Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988) (all holding that FAA § 1 excludes collective bargaining agreements) *with Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Rojas v. TK Communications Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Experts Co. v. Bates*, 71 F.3d 592, 596–602 (6th Cir. 1995) (all holding that FAA § 1 does not exclude individual contracts of employment, other than in the transportation sector).

[7] *Compare Austin v. Owens–Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996); *Consolidation Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125, 128–29 (4th Cir. 1995); *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Sine v. Local No. 992 Int'l*

tion of the exclusion, this collective bargaining agreement would be excluded from the FAA because Mr. Wright is employed in the transportation industry as a longshoreman. (JA 50a.)

Moving then to the second possible statutory basis for respondent's enforcement of this agreement, the LMRA, two obstacles were not recognized by the court below. *First*, a waiver of statutory rights under a labor contract must be clear and unmistakable, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), while courts proceeding under the FAA must indulge every ambiguity in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). Here, the agreement failed to recite clearly and unmistakably that members of the bargaining unit would be barred from bringing private rights of action under the ADA or other civil rights statutes. *Second*, a union does not have license to bargain away the statutory rights of employees beyond the labor-management arena. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981). Indeed, this Court has specifically held that Title VII rights could not be bargained away in a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974). These statutory standards, rather than the commercially-oriented provisions of the FAA, properly govern this case and compel reversal of the judgment below.

Brotherhood, 644 F.2d 997, 1002 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981); *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (FAA § 1 excludes collective bargaining agreements), *with O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997) ("contracts of employment" exclusion covers individual employment agreements only in the transportation industry).

II. *ALEXANDER v. GARDNER-DENVER CO.* WAS CORRECTLY DECIDED AND SHOULD BE REAFFIRMED

As recently as this Term, this Court emphasized that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997). Yet in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996), the Fourth Circuit preemptively declared *Alexander* effectively overruled by *Gilmer*. No other Circuit has taken this step.[8]

Alexander was correctly decided and should be reaffirmed. Petitioner and his *amici* present a variety of arguments in support of *Alexander*. We join in these arguments, and summarize here just a few of the problems presented when unions are placed in exclusive charge of workplace civil rights enforcement. To put this matter in perspective, antidiscrimination clauses are nearly universal in labor contracts.[9] Yet it is unions, not employees, that decide which grievances to pursue.[10] They may turn down claims that they do not want to

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[8] *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S. Ct. 294, 295 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995).

[9] The Bureau of National Affairs, *Basic Patterns in Union Contracts* 131–32 (13th ed. 1992) (survey of CBAs revealed that 97% of them included such clauses).

[10] A partial exception to this is the Railway Labor Act § 3 First (i), (j), 45 U.S.C. § 153 First (i), (j), and 45 U.S.C. § 184, which creates a

pursue, whether to conserve political capital for other battles or for other reasons unrelated to the merits of the claims. *Barrentine*, 450 U.S. at 742; *Vaca v. Sipes*, 386 U.S. 171, 191–92 (1967). This approach, while perhaps fitting for enforcement of purely contractual rights, is incompatible with the individual rights at stake under the civil rights acts. As this Court recognized in *Alexander*, 415 U.S. at 51, Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities."[11] Indeed, history has shown that a union's majoritarian interests periodically clash with the interests of minority employees, particularly in the area of seniority. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773–79 (1976).

Unions, too, would buckle under the demands of full-time civil rights enforcement. Their ability to turn down civil rights grievances against employers would be sharply limited because of the risk of incurring their own civil rights liability. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664–69 (1987). The hydraulic pressure would put unions to an unholy choice: either divert limited resources to civil rights claims, potentially driving the unions into receivership or extinction, or drop the antidiscrimination provisions from labor contacts, thereby depriving employees of the option of filing a grievance to challenge discriminatory practices. Even though antidiscrimination clauses have been with us for decades, employers only recently began to demand that discrimination claims be grieved. These demands exploit the holding in *Gilmer* to serve employers' goals of barring civil litigation and imposing financial and

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statutory right for employees to submit grievances to adjustment boards.

[11] *See also Livadas v. Badshaw*, 512 U.S. 107, 127 n.21 (1994) (reiterating concern from *Alexander* about majoritarian processes); *Pryner*, 109 F.3d at 363 (rejecting employer's position which "delivers the enforcement of the rights of these minorities into the hands of the majority").

political pressure on unions.

The preclusive effect that arbitration awards should have on later proceedings is also a significant question. *Austin*, 78 F.3d at 878 n.1, held that an applicable labor arbitration agreement "ousts a court of jurisdiction . . . ." In the present case, the district court relied upon *Austin* and dismissed the action without prejudice for lack of subject matter jurisdiction, and the Fourth Circuit affirmed. However, this Court in *Alexander* held that an unsuccessful arbitration under a collective bargaining agreement does not foreclose a *de novo* civil action by the employee under Title VII. *Alexander*, 415 U.S. at 59–60; *see also McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (unappealed arbitration of § 1983 civil rights claim has no collateral effect on subsequent judicial proceedings). The rulings of the courts below cannot be squared with *Alexander*, and this Court should reaffirm that grieving and arbitrating a statutory civil rights claim under a collective bargaining agreement is not a predicate to maintaining a judicial action to enforce statutory rights.

III. THE LARGER CONTEXT OF THIS CASE DEMONSTRATES THE NEED FOR FURTHER GUIDANCE ON THE ARBITRATION OF CIVIL RIGHTS CLAIMS

Gilmer did not envision that the use of arbitration processes to resolve statutory civil rights claims would entail a transformation of the respective rights of employers and members of a protected class. Indeed, it presumed that parties to an arbitration agreement would "'not forgo the substantive rights afforded by the statute,'" and that the arbitral forum would afford claimants a fair opportunity to present their claims and obtain legal and equitable remedies. *Gilmer*, 500 U.S. at 26, 31–32 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). George Nicolau, a past president of the National Academy of Arbitrators, observed that a voluntary arbitration system living up to

the promise of *Gilmer* would, of its own accord, attract employees who desired a prompt hearing of their claims.[12]

Contrary to these aspirations, some employers have abused the opening presented by *Gilmer* to pursue an agenda inimical to civil rights. The labor market has become flooded with arbitration agreements,[13] flowing down even to high school-age store clerks. *See Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997) (teenage cashiers bringing sex harassment suit against retailer barred by arbitration clause in their employment applications). These "agreements," often imposed involuntarily on a captive workforce, vary widely in quality and fairness. Some agreements that have come to public attention force workers to bear half of the often substantial costs of arbitration, surrender rights to damages and attorneys' fees, or proceed under one-sided rules. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 F.E.P. Cases (BNA) 681, 694–700 (D. Mass. 1998) (finding "structural bias in the system" caused by the fact that the New York Stock Exchange arbitration system is dominated by the securities industry). Nicolau, *supra* note 12, at 181–182 (describing a plan that waived punitive damages and allowed no

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[12] *See, e.g.*, George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: *Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. OF LAB. AND EMPLOY. LAW 175, 189-90 (1998) (forthcoming).

[13] *See, e.g.*, Michael A. Verespej, *Sidestepping Court Costs*, Industry Week, Feb. 2, 1998, at 68 (more than 400 employers, with a combined 4.5 million employees, have subscribed to some form of alternative dispute resolution for employment claims, mostly within the past two years); Leslie Kaufman and Anne Underwood, *Sign or Hit the Street*, Newsweek, June 30, 1997, at 48 (noting that employers such as ITT, JCPenney, Brown & Root, and Renaissance Hotels adopted arbitration systems for employment disputes).

discovery besides an exchange of exhibits and witness lists).[14] Concerns with the fairness of imposed arbitration procedures have recently led the National Academy of Arbitrators to state that it "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights," and to urge its members conducting such arbitrations to conduct their own independent evaluation of the fairness of the procedures.[15] Many arbitrators, of course, may not do so because their livelihoods are at stake. Without adequate procedural and substantive safeguards, a worker's involuntary "agreement" to arbitrate may thus become nothing more than a prospective waiver of civil rights, an approach that this Court decisively rejected in *Alexander*, 415 U.S. at 51–52 ("an employee's rights under Title VII are not susceptible of prospective waiver").

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[14] Commentators have written widely about the abuses of arbitration in the employment arena. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1 (1996); H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 Univ. of Det. Mercy L. Rev. 1 (1997); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 St. Louis U. L. J. 77 (1996); Donna Meredith Matthews, *Employment Law After* Gilmer: *Compulsory Arbitration of Statutory Anti-Discrimination Rights*, 18 Berkeley J. of Employment & Lab. L. 347 (1997); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts for the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

[15] *See* National Academy of Arbitrators, *Statement of the NAA on Individual Contracts of Employment and Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems*, May 21, 1997 (available at http://www.naarb.org/guidelines.html).

Numerous, unresolved issues surround the arbitration of civil rights claims.[16] Unlike the arbitration of claims in the securities industry, which is regulated by the Securities and Exchange Commission, *see* 15 U.S.C. § 78s; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987), there is no overarching federal executive authority for civil rights arbitration.[17] Because the lower courts are divided over these issues, there is a pressing need for clarity as to the required elements of a fair and effective arbitration process.

A. Agreements to Arbitrate Should Be Knowing and Voluntary

Amici have witnessed many attempts by employers to impose arbitration unilaterally as a condition of continued employment or consideration for employment. For instance, some employers include unilateral arbitration provisions in their employment manuals or written policies. *See EEOC v. River Oaks Imaging and Diagnostic*, 67 F.E.P. Cases (BNA) 1243 (S.D. Tex. 1995) (employer adopts arbitration agreement in the

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[16] Already during the present Term, the Court has denied certiorari in several cases raising issues about arbitration of civil rights claims. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997) (denial of attorneys' fees to prevailing plaintiff), *cert. denied*, 118 S. Ct. 695 (1998); *Nelson v. Cyprus Bagdad Copper Co.*, 119 F.3d 756 (9th Cir. 1997) (arbitration clause in employment manual not enforceable), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1998) (No. 97-1137); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.) (enforced arbitration clause over employee's objection that the clause was coercive), *cert. denied*, 118 S. Ct. 299 (1997); *Cosgrove v. Shearson Lehman Bros.*, 105 F.3d 659 (6th Cir.) (unpublished order) (arbitration agreement in employment application enforceable), *cert. denied*, 118 S. Ct. 169 (1997).

[17] The EEOC's regulatory authority under Title VII and the ADA is largely hortatory. 42 U.S.C. § 2000e-12 (Title VII); 42 U.S.C. § 12116 (Americans With Disabilities Act).

midst of an EEOC investigation). While some courts have rejected such involuntary programs,[18] most courts have upheld the right of employers to enforce these policies based solely on the willingness of employees to continue working, or of applicants to continue applying.[19]

The Circuits are split on the question whether relinquishment of the federal judicial forum and jury right requires a knowing and voluntary waiver, or is governed instead by ordinary contract principles. Most courts have applied a contract standard, holding that arbitration must be compelled except in cases tainted by fraud or coercion.[20] However, the Ninth Circuit, in *Prudential Insurance Company of America v.*

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[18] *Sportelli v. Circuit City Stores, Inc.*, No. CIV. A. 97-5850, 1998 WL 54335 (E.D. Pa. Jan 13, 1998) (finding that employee opted out of company arbitration program); *Nadeau v. Thomas*, No. 96-20383, 1997 WL 542708 at *3-4 (N.D. Cal. Aug 21, 1997).

[19] *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1439-40 (9th Cir.) (enforcing policy in employment manual), *cert. denied*, 513 U.S. 1044 (1994); *Bishop v. Smith Barney, Inc.*, No. 97 CIV. 4807(RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998) (enforcing arbitration clause in employee manual without individual assent; written company policy sufficient under FAA); *Leonard v. Clear Channel Communications I*, No. 972320-D/A, 1997 WL 581439 (W.D. Tenn. July 23, 1997) (enforcing unsigned, unacknowledged arbitration agreement in employment manual).

[20] *See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d at 229-30; *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861, 864-67 (D. Minn. 1997); *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091, 1097-98 (E.D. Mich. 1996); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995); *see also Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997) (noting split of authority and declining to decide whether contract or waiver standard applies).

Lai, 42 F.3d 1299, 1304–05 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), has held that the "text and legislative history of Title VII" required that an employee "knowingly agree[] to submit such disputes to arbitration."[21]

The "knowing and voluntary" standard flows from the standard generally applied to the waiver of a civil jury trial. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("as the right of [civil] jury trial is fundamental, courts indulge every reasonable presumption against waiver"); *KMC Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (9th Cir. 1985) (courts "overwhelmingly appl[y] the knowing and voluntary standard" to determine "the validity of a contractual waiver of [a civil] jury trial"); Grodin, *supra* note 14, at 36–39. A waiver standard also comports with the history of the Civil Rights Act of 1991. Section 118 of the Act states that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102–166, § 118, 105 Stat. 1071, 1081 (1991).[22] The Seventh Circuit interpreted this provision in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363

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[21] *See also Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760–61 (9th Cir. 1997) (applying the holding of *Lai* to the ADA), *cert. denied*, 66 U.S.L.W. 3474 (U.S. Apr. 20, 1998) (No. 97–1137); *Hooters of America, Inc. v. Phillips*, C.A No. A:96–3360–22, at 53 (D.S.C. Mar. 12, 1998) (applying knowing and voluntary standard to review of arbitration clause asserted by employer in sex harassment case); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 965 F. Supp. 190, 202 (D. Mass. 1997) (applying knowing and voluntary standard to waiver of jury right in sex discrimination case); Matthews, *supra* note 14, at 381-85.

[22] *See also* H.R. Rep. No. 102–40, Part I, 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635 (stating that this section was "intended to supplement, not supplant, the remedies provided by Title VII"); 42 U.S.C. § 12212 (same provision for the ADA).

(7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997) (Posner, C.J.), to hold that arbitration would not be "appropriate when it is not agreed to by the worker but instead is merely imposed," as by a collective bargaining agreement. The *Pryner* court also relied on unchallenged history, observing that "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury — a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII." *Id.* at 362. *See also Rosenberg*, 76 F.E.P. Cases (BNA) at 694 (1991 Act affirmed primacy of jury trials for Title VII cases).

The collective bargaining agreement in this case was not a knowing and voluntary waiver of Petitioner's rights under the ADA. As this Court noted in *Alexander*, while unions are generally empowered to waive the bargaining unit's statutory rights related to collective activity, such as the right to strike, individual civil rights are different:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Alexander, 415 U.S. at 51–52. This Court has reaffirmed this point twice since *Alexander*, both in *Gilmer*, 500 U.S. at 35 (under a collective bargaining agreement, employees do not agree to arbitration of their own statutory claims), and in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994) (reiterating concern from *Alexander* about majoritarian processes). Any waiver of "an individual's rights to equal opportunities," *Alexander*, 415 U.S. at 51, should be on a "knowing and voluntary" basis, under which the employee is given an in-

formed and individual choice either to accept arbitration and its presumed benefits or to retain his or her right to a judicial forum and jury trial.

B. Arbitration Agreements Should Not Impose Potentially Onerous Costs on The Claimant

If arbitration were fair, it could be voluntary and many employees may sign up for it. As long as employers are free to impose arbitration on their employees, however, they can add onerous terms without loss of employee participation. Thus, employers have generally sought to shift some or all of the costs of arbitration to the complaining party. *See, e.g.*, Appellant's Opening Brief at 34–36, *Duffield v. Robertson Stephens & Co.* (pending 9th Cir.) (No. 97–15698) (record of proceeding established that arbitrators in the securities field charge fees starting from $1,000 per half-day, mounting up to a total of $82,800 in one complex case, and such fees are imposed on each party); Alleyne, *supra* note 14, at 410–11 (noting that arbitrators' fees can run from hundreds to thousands of dollars). An employee notified by letter, as often happens in practice, that she must within a few days pay several hundred—or even thousands of—dollars in fees prior to arbitration can be deterred from pursuing even a meritorious claim. Common sense suggests that this happens frequently.

A few courts confronting this situation have barred fee shifting.[23] Yet this issue is only in its infancy and it remains to

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[23] *See, e.g., Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (interpreting the fees provision from the arbitration agreement to apply only to the employer, and holding that it is impermissible to charge the employee for all or part of the arbitrator's fees and expenses); *McWilliams v. Logicon, Inc.*, No. CIV. A. 95–2500–GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997) (holding that employer must pay the arbitrator's fee); *Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 74 F.E.P. Cases (BNA) 94, 96 (D. Colo. 1997) (contract

be seen whether other courts may resolve the issue differently.[24]

C. Arbitration Procedures Must Provide Remedies And Safeguards Coextensive With Those Available in a Judicial Forum

Gilmer recognized as a precondition to arbitration that the parties may "not forgo the substantive rights afforded by the statute; [the agreement] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). As Congress has decided, a panoply of remedies and statutory safeguards is essential to deter and remedy discrimination, both in particular cases and throughout our society. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

Notwithstanding *Gilmer*'s careful reservation, employers have forced workers to waive statutory rights and remedies. *See, e.g., Pala[illegible]o v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060–62 (11th Cir. 1988) (arbitration clause that

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requiring plaintiff to shoulder one-half of fee for arbitrator, including half of a $6000 deposit, held unenforceable). As the D.C. Circuit held in *Cole*, 105 F.3d at 1485, a plaintiff "could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." *See also* Alleyne, *supra* note 14, at 410–11 (noting the risks of excess costs to the integrity of arbitration, no matter who pays); Grodin, *supra* note 14, at 44-45 (elimination, or at least lowering, of financial barriers essential to fair arbitration).

[24] *Cf. Rollins Inc. v. Foster*, No. Civ.A. 97-T-945-N, 1998 WL 25702, at *9–11 (M.D. Ala. Jan. 20, 1998) (rejecting unconscionability challenge to arbitration clause in homeowner's agreement with pest control company that required homeowner to pay arbitration fees).

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provides only for award of contract damages) (Cox and Tjoflat, JJ., concurring); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 464–70 (S.D.N.Y. 1997) (barring award of statutory attorneys' fees); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1462 (D. Minn. 1996) (holding that if arbitrator finds that provision requiring both parties to bear own attorneys' fee bars award of fee to prevailing plaintiff, agreement would be unenforceable); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027–28 (D.N.M. 1996) (employee's Title VII and ADA claims not subject to arbitration because agreement did not provide full range of statutory damages). While these efforts to limit the rights of claimants are stopped by some courts such as the above, other courts let them pass and the mere existence of such efforts shows that some employers cannot resist the temptations they think *Gilmer* allows them.

The Third Circuit has given tacit approval to this approach, allowing that such terms may be enforced by an arbitrator. In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997) the arbitration agreement included provisions waiving the employee's right to attorneys' fees and punitive damages, and imposing a two-year statute of limitations on her state law discrimination claims. The court did not hold the terms unenforceable as a matter of law, but instead referred the matters to the arbitrator to determine whether the plaintiff had in fact agreed to abandon statutory rights. *See also Kinnebrew v. Gulf Insurance Co.*, 67 F.E.P. Cases (BNA) 189, 191 (N.D. Tex. 1994) (referring claim to arbitration under policy that bars punitive damages, injunctive relief and attorneys' fees). By referring these matters to arbitration, the courts may simply have deferred litigation until the time to enforce the award, thus undermining the expectation that arbitration will afford prompt and inexpensive relief. *See Pryner*, 109 F.3d at 362 (noting the "spectre" of satellite litigation).

In this case, the contract denied Mr. Wright not only his personal right to control his own claim, but also sufficient time

to make his claim. Under the collective bargaining agreement at issue, Mr. Wright was allowed only 48 hours to file a grievance, the first step for invoking arbitration. (JA 55a.) In contrast, under the Americans with Disabilities Act, Mr. Wright would otherwise have had 300 days to file a charge with the Equal Employment Opportunity Commission. 42 U.S.C. § 12117(a) (adopting Title VII enforcement procedures); 42 U.S.C. § 2000e–5(e) (providing time for filing charges).

The period provided by many collective bargaining agreements short-circuits the schedule set forth by Congress for reporting violations of civil rights. Such a limitations period should not be enforced because it fails "to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act." *Burnett v. Grattan*, 468 U.S. 42, 49 (1984) (holding that the district court erred when it borrowed Maryland's six-month limitations period for administrative filing of civil rights charge for section 1981 lawsuit).

Arbitration under collective bargaining agreements also hobbles potential injunctive relief. Arbitrators have no power to invalidate or refuse to enforce parts of a collective bargaining agreement. *Barrentine*, 450 U.S. at 745. As this Court held in *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

Courts, by contrast, may enjoin labor agreements. *See, e.g., EEOC v. Board of Governors of State Colleges*, 957 F.2d 424, 429–31 (7th Cir.) (provision that precludes arbitration of any

claim after employee files an EEOC charge violates anti-retaliation section of the ADEA), *cert. denied*, 506 U.S. 906 (1992); *Schafer v. Board of Public Education*, 903 F.2d 243, 248 (3d Cir. 1990) (provision of CBA making childrearing leave available for up to one year only for female teachers violates Title VII *per se*). Likewise, arbitrators cannot modify labor agreements,[25] while courts are allowed to do so.[26] Unless the institution of labor arbitration were to be radically transformed, arbitrators will always lack the power to provide remedies outside of the agreement itself.

D. Arbitration Must Provide Fair and Accountable Procedures

The Court established in *Gilmer* that arbitration may substitute for civil litigation only when the alternative forum affords fundamental procedural protections. *Gilmer*, 500 U.S.

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[25] *See, e.g., Excel Corp. v. United Food & Commercial Workers*, 102 F.3d 1464, 1468 (8th Cir. 1996); *Walker v. Consolidated Freightways Inc.*, 930 F.2d 376, 381 (4th Cir.), *cert. denied*, 502 U.S. 1004 (1991); *Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 41 (1st Cir 1985); *Teamsters, Chauffeurs, Warehousemen, Helpers and Food Processors, Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984).

[26] This Court approved an award of retroactive seniority in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773–79 (1976), over an employer's argument that it would violate seniority expectations of other employees in the bargaining unit. *See also Sears v. Bennett*, 645 F.2d 1365, 1378 (10th Cir. 1981) (award of seniority to plaintiffs within broad discretion of court), *cert. denied*, 456 U.S. 964 (1982); *EEOC v. United Air Lines, Inc.*, 560 F.2d 224, 234 (7th Cir. 1977) (CBA may be modified to grant enhanced seniority), *cert. denied*, 434 U.S. 1063 (1978).

at 30–32.[27] However, the case law reveals instances in which employers have attempted to impose one-sided procedures. Two district courts this year have, after extensive evidentiary submissions, thrown out arbitration policies that were biased against employees. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 76 F.E.P. Cases (BNA) 681, 694–700 (D. Mass. 1998), for example, the district court reviewed the New York Stock Exchange arbitration system and held that domination of decision-making by agents of the securities industry rendered it an unfit forum for civil rights actions. *See also Hooters of America, Inc. v. Phillips*, C.A No. A:96-3360-22 (D.S.C. Mar. 12, 1998) (rejecting arbitration policy that barred depositions, did not provide for neutral arbitrators, limited allowable damages, and barred award of attorneys' fees).

A significant problem in the labor field is the secrecy of arbitration decisions. Labor arbitration awards are usually confidential,[28] yet publication of decisions in the civil rights field

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[27] *See generally* National Academy of Arbitrators Task Force on ADR in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, May 9, 1995 (available at http://www.naarb.org/protocol.html) (signed by representatives of the National Academy of Arbitrators, the American Arbitration Associations, the Labor & Employment Section of the American Bar Association, and other organizations). *See also* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. Rev. 443, 489–90 (1995) (enforceable arbitration system would have to include right to counsel, adequate discovery, mutual selection of arbitrator, ability to call witnesses, and anti-retaliation commitment to cooperating witnesses).

[28] *See Code of Professional Responsibility for Arbitrators of Labor Management Disputes*, art. II, § C(1)(c) (making it a "violation of professional responsibility for an arbitrator to make public an award

serves an irreplaceable public good. Private civil rights litigation is the engine that drives enforcement of America's antidiscrimination laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("[t]he private right of action remains an important part of Title VII's scheme of enforcement . . . [and] Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself"); *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in enforcement process of Title VII"). Published opinions are integral to this function: they are necessary to educate employers and employees alike about the norms of civil rights law. *See Rosenberg*, 76 F.E.P. Cases (BNA) at 687–88; Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 Yale L. J. 1157, 1160–61 (1998) (encouraging disclosure of arbitration decisions); Stone, *supra* note 14, at 1043–47 (discussing educational function of civil rights opinions). In *Gilmer*, the Court recognized the need for public opinions, noting that enforcement of the U-4 form arbitration clause would not harm civil rights enforcement because New York Stock Exchange rules require written and publicly available arbitration awards, and "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." 500 U.S. at 31–32. Without a mechanism to disseminate the results of civil rights arbitrations, an essential element of civil rights litigation will be lost.

E. Arbitration Awards Must Be Subject to Meaningful Judicial Review

In *Gilmer*, the Court stated that judicial review is a corrective to errant arbitrators. 500 U.S. at 30–31. Yet the

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without consent of the parties"), *reprinted at* Jay E. Grenig, 26 WEST LEGAL FORMS: ALTERNATIVE DISPUTE RESOLUTION, App. 11C at 770 (1995).

awards of commercial and labor arbitrations, based on interpretation of agreements freely bargained by the parties, have long been accorded deferential judicial review. *See, e.g., United Steelworkers*, 363 U.S. at 597–99 (where arbitrator's award concerns construction of collective bargaining agreement, court lacks authority to overrule the arbitrator's interpretation); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956) (no review of arbitrator's error in interpreting contract). This area must be reevaluated in light of the expansion of arbitration to the civil rights arena.

Review of arbitration awards of statutory claims must rise to a level "sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987); *see also Gilmer*, 500 U.S. at 32 n.4 (making same point in context of ADEA). The appropriate level of review should necessarily be higher in a case reviewing a statutory employment discrimination claim than in one reviewing garden-variety labor disputes, because arbitrators have "authority only to resolve questions of contractual rights." *Id.* at 34; *see, e.g., McDonald v. City of West Branch*, 466 U.S. at 290 (rejecting suggestion that arbitration can "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard"); *Barrentine*, 450 U.S. at 737 ("[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers").

Unfortunately, however, most courts currently do not subject arbitration decisions of statutory claims to sufficient review. In some instances, courts are essentially precluded from reviewing awards because of the absence, as noted above, of written opinions. Indeed, in THE ARBITRATOR'S MANUAL (1996), issued by the Securities Industry Conference on

Arbitration, arbitrators are instructed that they need neither strictly follow decisional law nor issue written opinions. Even when courts are able to review awards, their application of the general standard of review for arbitration awards, "manifest disregard of the law," *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995), fails to ensure that arbitrators give due regard to statutory requirements. Typical is the Eleventh Circuit's recent decision in *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997), holding that reversal of an award for manifest disregard of the law requires proof that the arbitrator was "conscious of the law and deliberately ignore[d] it."[29] Moreover, not all Circuits allow even this paltry standard of merits review. *McIlroy v. Painewebber Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993) (declining to recognize "manifest disregard" standard).

A more appropriate approach to review has been adopted by the D.C. Circuit. While noting that courts ordinarily defer to arbitrator's awards, *Cole* held that the manifest disregard standard is somewhat elastic and "must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases." 105 F.3d at 1487. The court explained:

> The nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims. In this context, the Supreme Court has assumed that

[29] *See also Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 594 (8th Cir. 1998) (applying deferential "manifest disregard" standard to civil rights case); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998) (applying deferential standard to reverse an award in favor of plaintiff that awarded no attorneys' fees to him as a prevailing party); *Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 224–29 (S.D.N.Y. 1997) (rejecting argument for heightened scrutiny in civil rights cases).

> arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law.

Id. at 1468–69. Thus, "there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.* at 1487. However, even *Cole* failed to recognize the need for factual findings to ensure that the law was properly applied to the facts, let alone the need for review of plainly erroneous findings.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

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